SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 775.

JOSEPH E. GAY, APPELLANT,

v.

THE BALTIC MINING COMPANY ET AL., APPELLEES.

BRIEF FOR APPELLEES.

We appear for the Baltic Mining Company and its officers and directors, in support of the constitutionality of the Corporation Tax law. While it is apparent that the financial interest of this company, like that of other corporations, is to escape the burdens of taxation, yet, the Board of Directors of this Company (Record, p. 7) "Voted to instruct the officers of the Company to file the returns with the Collector of Internal Revenue, and also to pay the tax, as required by law". Mr. William A. Paine, the President of the Company, replied to the demand made by the objecting stockholder (Record, p. 7), that "as the law stands, the Directors do not feel there is any other course open to them". In a like situation, the eminent counsel for one of the corporation defendants in the Income Tax cases, in his introductory statement said: "I am glad that there is at least one great corporation subjected to the tax, which avows its readiness to submit itself without controversy or

contention to the law of the country, and to discharge the burdens which that law imposes upon it".

Mr. James C. Carter in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, 514.

The provisions of the Federal Constitution, referring to taxation, are as follows:

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers."

Article 1, Sec. 2, Clause 3.

"The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Art. 1, Sec. 8, Clause 1.

The migration or importation of persons by the states was not to be prohibited prior to 1808, but a tax or duty might be imposed on such importation, not exceeding ten dollars for each person.

Art. 1, Sec. 9, Clause 1.

"No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Art. 1, Sec. 9, Clause 4.

"No tax or duty shall be laid on articles exported from any state."

Art. 1, Sec. 9, Clause 5.

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports,

except what may be absolutely necessary for executing its inspection laws."

Art. 1, Sec. 10, Clause 2.

"No state shall, without the consent of congress, lay any duty of tonnage."

Article 1, Sec. 10, Clause 3.

The above provisions contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

Pacific Insurance Co. v. *Soule*, 7 Wall. 433, 444.

The two classes mentioned in these provisions, namely, "taxes", on the one hand, and "duties, imposts and excises," on the other hand, embrace all forms of taxation contemplated by the Constitution. Indeed, they apparently cover the whole field of taxation, for other forms of taxation, if any exist, which are not embraced within these terms, still remain undiscovered.

Thomas v. *United States*, 192 U. S. 363, 370.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 557.

The taxing power is thus granted in the most comprehensive terms. The only limitations imposed upon Congress are: That direct taxes, including capitation taxes, shall be apportioned; that duties, imposts and excises shall be uniform throughout the United States; and that no taxes or duties shall be imposed on exports from any State.

"With these exceptions, the exercise of the power is, in all respects, unfettered", unless in a case where conflict is shown with the due process clause of the Fifth Amendment.

Pacific Insurance Co. v. *Soule*, 7 Wall. 433, 446.

"The taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument."

McCray v. *United States*, 195 U. S. 27, 59.

The real issue here involved is whether this Corporation Tax is an "excise", within the meaning of the Constitution. If an "excise", it is valid, unless it conflicts with the rule as to uniformity. If not an "excise", it matters not what else it may be; it cannot here be sustained. The real issue, therefore, involves no definition or discrimination between "direct" taxes and "indirect" taxes, for the latter term is not used in the Constitution. Nor is the issue whether this is a "direct tax" or an "excise", for this form of question erroneously assumes that direct taxes and excises cover the whole domain of taxation, whereas the Constitution also mentions "duties" and "imposts". The proper statement of the real issue is: — Does this law impose an "excise"?

The exact terms of the Corporation Tax law show plainly the intent to impose an "excise", of the same general character as many "excises" which have heretofore been sustained by this Court. The Act, upon its face, shows how radically distinct it is from the law considered in the Income Tax cases.

The Corporation Tax law (Section 38 of the Act of August 5, 1909) provides: "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year"; exempting, however, from the operation of the act "labor, agricultural or horticultural organizations"; "fraternal beneficiary societies, orders, or associations operating under the lodge system"; "domestic building and loan associations"; and "any corporation or association organized and operated

exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual".

I.

THE CORPORATION TAX LAW IS AN "EXCISE", WITHIN THE MEANING OF THE FEDERAL CONSTITUTION.

Is this Corporation Tax an "excise", within the meaning of that term, as used in the Federal Constitution, and as applied in the numerous decisions of this Court with respect to "excises"? If it is an "excise", the distinctions between all these different suits now before the Court at once disappear, for they rest simply upon the fact that different kinds or classes of property or income are held by the several corporations. In the case of an "excise", it becomes immaterial what kind or class of property is held by the corporation, whether realty, mines, United States bonds, municipal bonds, tax exempt securities, or other classes of property, or, indeed, whether the corporation has any property at all, for an "excise" is not, in any sense, a tax upon "property". Distinctions with respect to the kind of property owned have no material bearing, excepting only in the case of "direct" taxes; and even there, under the Income Tax decisions (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601), it would seem that the kind or class of property possessed cannot be a material factor in the case, for if a tax is not an "excise", but a "direct tax", it is not affected by the consideration whether the property be real or personal, or whether it be the income thereof. All kinds of property and all classes of income derived from property are treated alike. Taxes upon property, real or personal, or upon the income of property, real or personal, are "direct taxes", and cannot be levied except under the rule of apportionment among the States, according to population. We concede that a mine is property of a

peculiar nature: and that the fruits and products of land, whether vegetable, animal or mineral, until severed, are as much realty as the land itself or the rentals thereof.

Caldwell v. *Fulton*, 31 Pa. St. 475, 483.
Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, 692.
Co. Lit. 4 a, 4 b.
2 Bl. Com. 18.

But the peculiar nature of the property is here an inconsequential factor, if the tax is an "excise". If the law imposes a "direct tax", obviously it is invalid because not apportioned, according to population.

It is unnecessary here to attempt a complete and adequate definition of the term "excise". It suffices, for the purposes of this case, to determine that this tax represents one form of "excise", and properly comes under that term, as used in the Constitution. All attempts to make a complete and adequate definition of the term "excise" have hitherto failed.

See *Patton* v. *Brady*, 184 U. S. 608, 617, 618.
Pacific Insurance Co. v. *Soule*, 7 Wall. 433, 445.
1 Blackstone Comm. p. 318.
Story Const., Sec. 953.
Cooley, Taxation, p. 3.
Andrews Rev. Law, Section 133.
Bateman's Excise Law, 96.
Oxford Dictionary (Murray), under "Excise".

All these attempted definitions are incomplete and inadequate, in that they all leave out well recognized classes of "excises", such as those on corporate franchises, particular business transactions, successions, vocations, occupations, professions, privileges and the like, many of which classes, from the foundation of this Government, have been regarded as "excises".

As was said by Chief Justice Fuller in *Thomas* v. *United*

States, 192 U. S. 363, 370, "There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like".

Under the Rule of Stare Decisis, the Corporation Tax Must be Held to be an "Excise". Otherwise, Numerous Decisions Holding Identical or Analogous Taxes to be "Excises" Must be Overruled.

Upon examination of the decisions of this Court, involving analogous taxes, and even substantially identical taxes, it becomes clear that this Corporation Tax must be held to be an "excise", unless a considerable number of decisions of this Court are to be regarded as overruled.

Thus, in *Pacific Insurance Company* v. *Soule* (7 Wall. 433), the Civil War tax upon insurance companies was held to be an "excise", and not a direct tax. The statute there involved (Sections 105 and 120 of the Internal Revenue Act of June 30, 1864, as amended by the Act of July 13, 1866) imposed a tax upon the "amounts insured, renewed, or continued by insurance companies; upon the gross amount of premiums received and assessments by them"; and a tax also upon "dividends, undistributed sums, and income". If a tax so expressed properly constituted an "excise", as was there held, we submit that the present act, which specifically calls the tax a "special excise tax"; which is expressed to be, not a tax directly levied "upon" dividends or income, but a tax "equivalent to" a certain percentage upon the "entire net income"; and which is still further designated as a special excise tax "with respect to the carrying on or doing business by such corporation", must still more clearly be held to be an "excise", rather

than a direct tax, unless the *Soule* case is to be regarded as overruled. There is no material difference in the language of the two acts, with respect to the standard whereby the amount of the tax is to be measured. In that case, the tax was upon the "gross amount of premiums received", and also upon "dividends, undistributed sums, and income". Here the tax was measured by the "entire net income". Mr. Justice Swayne there said (p. 446): "If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the *business* of an insurance company can be held to belong to that class of revenue charges. . . . To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise".

In the same case, the practical consequences of holding such corporation taxes to be direct taxes were thus forcibly stated (p. 446): "The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition".

But it has been argued that this and other analogous cases, hereinafter referred to, have been overruled by the Income Tax cases. (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601.) But there are wide differences between the Income Tax there under consideration, and the present Act. That Act covered individuals and firms as well as corporations. This law applies only to corpo-

rations, joint stock companies and associations organized for profit and having a capital stock represented by shares, and insurance companies. Here the tax is expressly levied "with respect to the carrying on or doing business by such corporation", that is, upon the corporate franchises, or upon the privilege of doing business in a corporate or *quasi* corporate form, or upon the business when carried on in a specified way, or under certain forms, differing from all other methods or forms of doing business, whether conducted by firms or individuals. Here also, while this is not conclusive, it is at least worthy of remark that this tax is designated, in the Act itself, as a "special excise tax".

In the Income Tax cases (157 U. S. 429; 158 U. S. 601) four matters were decided by the Court:

First: That a tax upon real estate is a direct tax.

Second: That a tax upon personalty is likewise a direct tax, as no sound distinction exists between a tax levied upon a person, solely because of his general ownership of real estate, and a tax so levied, solely because of his general ownership of personal property.

Third: That a tax upon the income derived from property, whether real or personal, is the legal equivalent of a direct tax upon the property from which such income is derived, and is, therefore, a direct tax, and must be apportioned.

Fourth: That while the Income Tax law covered also all other sources of income, like professional incomes, not derived from property or investments, such other classes of income were so inextricably blended, under the terms of the Act, with income derived from property that the whole Act formed one indivisible scheme of taxation; that it could not, for a moment, be supposed that Congress would have taxed such other forms of income, if it had understood that the tax on incomes from real and personal property would

be held to be invalid, and therefore that the whole Act must be deemed to be invalid.

See *Knowlton* v. *Moore*, 178 U. S. 41, 82.

In the opinion in the Income Tax cases, the Court indicated no intention of overruling the *Soule* case and other similar cases. On the contrary, the Court upheld the validity of these decisions, distinguishing them, and stating (157 U. S. 576) that in the *Soule* case "the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611, and *Hamilton Company* v. *Massachusetts*, 6 Wall. 632".

In *Knowlton* v. *Moore* (178 U. S. 41), Mr. Justice White (p. 82), stating the effect of the decision in the Income Tax cases, said: "These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

In *Railroad Co.* v. *Collector* (100 U. S. 595), the Civil War tax was upheld as an "excise" on the business of the class of corporations mentioned in the act, which provided that railroad, canal, turnpike and certain similar classes of corporations, which should issue bonds upon which interest was to be paid, or should declare dividends payable to its

stockholders as part of the "earnings, profits, income, or gains of such company", and "all profits of such company carried to the account of any fund, or used for construction", should be subject to and pay a tax of five per cent on the "amount of all such interest or coupons, dividends or profits". This act was held to be constitutional, notwithstanding the further fact that the act authorized the tax to be collected directly from the corporation, authorizing it to withhold the amount of the tax from the dividends and coupons on which it was imposed, even though due to a foreign stockholder or bondholder, Mr. Justice Miller stating (p. 598): "The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. . . . The tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest . . . (p. 599). The tax is laid by Congress on the net earnings, which are the results of the business of the corporation, on which Congress had clearly a right to lay it".

This decision was followed in —

United States v. *Erie Railway Co.*, 106 U. S. 327.

It has never been questioned as law, but has been expressly approved in,—

Railroad Co. v. *United States*, 101 U. S. 543, 550.
Bailey v. *Railroad Co.*, 106 U. S. 109, 115.
Memphis & Charleston R. R. Co. v. *United States*, 108 U. S. 228, 234.
Little Miami, etc., R. R. Co. v. *United States*, 108 U. S. 277, 279.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, it was held that an act which provided that every National banking association, State bank, or State banking association should pay a

tax of ten per cent on "the amount of notes of any State bank, or State banking association, paid out by them" after a specified date, did not impose a direct tax. While the Court regarded this as a tax on bank circulation, rather than upon the franchise of the bank, the Court held it to be an "excise". Chief Justice Chase there said (p. 547): "But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property".

See also *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632, 638.

So, also, State statutes imposing taxes on savings banks, based on the aggregate amount of their deposits, and on manufacturing corporations, based upon the excess of the market value of their capital stock over and above the value of their real estate and machinery, have been upheld as "excises". In such cases, it is immaterial whether the deposits or capital are invested in United States bonds or other tax exempt securities, for the tax is not a property tax.

Society for Savings v. *Coite*, 6 Wall. 594.
Provident Institution v. *Massachusetts*, 6 Wall. 611.
Hamilton Co. v. *Massachusetts*, 6 Wall. 632.

See also,—

Portland Bank v. *Apthorp*, 12 Mass. 252, 256.
Van Allen v. *The Assessors*, 3 Wall. 573.
Home Insurance Co. v. *New York*, 134 U. S. 594.
Pullman Co. v. *Pennsylvania*, 141 U. S. 18.
State Tax on Railway Gross Receipts, 15 Wall. 284, 293.

It has been urged, however, that all these cases, involving Civil War taxes upon the business or earnings of corporations, have been swept away by the decision in the Income Tax cases (157 U. S. 429; 158 U. S. 601), because of the fact that a conclusion was there reached as to general income taxes upon individuals, based solely on the general ownership of property, which differed in its results from the decision arrived at with respect to the Civil War Income Tax. (*Springer* v. *United States*, 102 U. S. 586.)

Yet, even as to the *Springer* case, the Court in the Income Tax cases (157 U. S. 429, 578, 579) expressly distinguished that case, and refused to regard it as overruled, stating that a tax on the professional receipts of an attorney at law, as in the *Springer* case, might well be "treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct".

Whatever may be said as to the effect of the Income Tax decision in overruling the *Springer* case, it cannot be shown that the Court cast any doubt upon the correctness of the above decisions holding corporation taxes to be excises. Yet these and other analogous decisions must be regarded as overruled, if the present Act be held not to constitute an "excise" tax. That the Court, in the Income Tax cases, did not intend to intimate any doubt as to its previous decisions on corporation excise taxes, is clearly shown by the language of the opinion (158 U. S. 635), "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such".

See also *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 413.

In *Knowlton* v. *Moore*, (178 U. S. 41), which held the succession tax imposed by the Act of 1898 to be an excise, following the earlier case of *Scholey* v. *Rew* (23 Wall. 331), a similar argument was addressed to the Court, to the effect that *Scholey* v. *Rew* had been overruled by the Income Tax cases. But the Court held otherwise, Mr. Justice White stating, (p. 81): "There was no intimation in the *Pollock* case that inheritance taxes — which had been held in *Scholey* v. *Rew* not to be direct, which had from all time been considered as being imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise — were direct taxes within the meaning of the Constitution".

In *Plummer* v. *Coler*, (178 U. S. 115) it was held that the New York inheritance tax law was an "excise", and not a direct tax upon property, and therefore constitutional, irrespective of the fact that the property included in the estate of the deceased was composed, in whole or in part, of tax-exempt United States bonds. The Court stated (p. 137):

> "We are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents."

The exact similarity between succession or inheritance taxes and taxes upon corporate franchises, was so far recognized in that case that the Court admitted that they

must stand or fall together, as "excises", resting its decision largely upon the line of corporation tax cases above cited. In neither case, can the character of the property held by the estate of the deceased, or by the corporation, whether United States bonds, municipal bonds or other forms of property, be regarded as a material factor in the determination of the constitutionality of the tax, for the Court there states (p. 135) that if the proposition is sound, that the character of the property held may be taken into account, "then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property or capital possessed by the corporation even when composed in whole or in part of United States bonds, must be overruled. . . . So that we return to the authorities, by which it has been established that a tax upon a corporate franchise, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the State".

As there is no substantial difference between taxes upon corporate franchises and succession taxes, the long line of decisions establishing the validity of inheritance taxes, as "excises", is directly in point here. Being "excises", their validity is not questionable by reason of the fact that United States tax-exempt securities, or State or municipal bonds, or other instrumentalities of State governments, are included within the estate or capital thus subjected to an excise tax.

Scholey v. *Rew*, 23 Wall. 331.
Knowlton v. *Moore*, 178 U. S. 41.
Plummer v. *Coler*, 178 U. S. 115.

Murdock v. *Ward*, 178 U. S. 139.
Snyder v. *Bettman*, 190 U. S. 249.
Mager v. *Grima*, 8 How. 490.
United States v. *Perkins*, 163 U. S. 625.
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283.
New York v. *Roberts*, 171 U. S. 658.
Orr v. *Gilman*, 183 U. S. 278.
Billings v. *Illinois*, 188 U. S. 97.
Blackstone v. *Miller*, 188 U. S. 189.
Campbell v. *California*, 200 U. S. 87.
Cahen v. *Brewster*, 203 U. S. 543.
Chanler v. *Kelsey*, 205 U. S. 466.
Buck v. *Beech*, 206 U. S. 392, 408.

The Corporation Tax cannot properly be held to be a property tax rather than an "excise", without overruling the succession tax decisions, unless some legitimate distinction can be drawn between a succession tax and a tax upon corporate franchises or privileges, and this Court has already stated that no such distinction exists, both being regarded as "excises".

This Spanish War Revenue Act of 1898 covered also various other classes of taxes which have been held to be "excises".

In *Nicol* v. *Ames* (173 U. S. 509), it was held that the tax imposed upon "each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery" constituted an "excise", and not a direct tax requiring apportionment, and was therefore constitutional, the Court (p. 519) stating that "the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act", and that "the amount of such a tax when imposed in a case like this may

be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one".

In *Treat* v. *White* (181 U. S. 264) taxes levied on "calls" for shares of stock were held to be valid "excises".

In *Patton* v. *Brady* (184 U. S. 608) taxes levied upon "all tobacco and snuff, however prepared, manufactured and sold, for consumption or sale" and "held and intended for sale" at the date of the act, were held to be "excises".

In *Thomas* v. *United States* (192 U. S. 363) the stamp tax on memoranda or contracts for the sale of certificates of stock, was upheld as a valid "excise", upon the ground (p. 371) that "the sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates".

In *McCray* v. *United States* (195 U. S. 27) it was held that the Oleomargarine Act of 1886, imposing a tax upon oleomargarine, artificially colored so as to look like butter, constituted a valid "excise" duty, irrespective of the fact that natural butter artificially colored was not so taxed. See also *In re Kollock*, 165 U. S. 526.

If there were no other precedents involved, we submit that the tax involved in *Spreckels Sugar Refining Co.* v. *McClain* (192 U. S. 397) was so closely analogous to the Corporation Tax that this decision alone would be decisive, to the effect that the tax here involved was an "excise", rather than a direct tax upon property. In that case, Section 27 of the War Revenue Act of 1898 was under consideration, which provided that "every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, . . . whose gross annual receipts exceed two hundred and fifty thousand

dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars". This tax was held to be an "excise", and not subject to any constitutional objection.

Mr. Justice Harlan there said (p. 411): "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

The close similarity between that act and the language of the Corporation Tax law is apparent. There, as here, the tax was not, in terms, levied directly upon the gross receipts, but at a rate "equivalent to" a certain percentage upon such receipts. The tax was there measured by the "gross amount of all receipts"; here by the "entire net income". There, as stated by the Court (p. 411), the tax was not imposed upon the gross annual receipts as property, but only "in respect of the carrying on or doing the business of refining sugar". Here the act, in terms, imposes the tax "with respect to the carrying on or doing business by such corporation".

In *New York* v. *Roberts* (171 U. S. 658), the New York State tax upon the "franchise or business" of corporations, domestic and foreign, based on the amount of their capital stock employed within the State, was upheld as an "excise", notwithstanding certain discriminatory exemptions, and the claim that the tax was invalid because a portion of such capital consisted of imported goods in the original packages. Mr. Justice Shiras there said (p. 664): "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a

corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

It is unnecessary to make extended reference to the numerous instances which have occurred ever since the foundation of our Government, where taxes have been upheld as "excises", when levied upon privileges, professions, vocations, occupations, special kinds of business, particular business transactions and the like. (See *Scholey* v. *Rew*, 23 Wall. 331, 348.) As was said by Mr. Justice Brown, referring to stamp taxes upon documents, in *Snyder* v. *Bettman* (190 U. S. 249, 253): "Referable to the same principle is the power of Congress to tax occupations which can only be carried on by permission of the state authorities and under conditions prescribed by its laws — such, for instance, as the profession of a lawyer or physician, or the business of dealing in spirituous liquors, for which licenses are required under the laws of nearly all the States. While the power of Congress to impose such taxes may never have been expressly affirmed by this court, it does not seem to have been seriously questioned, and is a legitimate inference from *McGuire* v. *The Commonwealth*, 3 Wall. 387; *The License Tax Cases*, 5 Wall. 462; *Pervear* v. *The Commonwealth*, 5 Wall. 475, and *Royall* v. *Virginia*, 116 U. S. 572, 580".

II.

AS AN EXCISE TAX, THE CORPORATION TAX IS UNIFORM, AND OTHERWISE FULLY COMPLIES WITH ALL CONSTITUTIONAL REQUIREMENTS.

If the Corporation Tax were a direct tax, within the meaning of the Constitution, nothing could be said in favor of its validity, because no attempt has been made to apportion

the tax among the several States, according to their population. But, on the contrary, it has been shown that this tax is an "excise", and not a direct tax upon property. As an "excise", it must be "uniform throughout the United States". (U. S. Const., Art. 1, Sec. 8.)

It is now well settled that this Constitutional requirement refers merely to geographical uniformity, and not to "intrinsic uniformity", and that it merely means that, whatever may be the subject of taxation which is selected, this must be taxed at the same rate throughout the United States.

Knowlton v. *Moore*, 178 U. S. 41.
Patton v. *Brady*, 184 U. S. 608, 622, 623.

No question can be raised with respect to the Corporation Tax, so far as geographical uniformity is concerned, for there is no doubt that it is intended to operate at the same rate throughout all parts of the United States.

Special Constitutional Objections which have been Urged.

1. It has been urged that a corporate franchise, being a creature of the State, which alone has the power to create, regulate and destroy it, cannot be made subject to taxation by the Federal Government. In our dual system of Government, all proper subjects for taxation are located within the taxing jurisdiction of two distinct sovereign powers. The same taxable object may be taxable by each of them. The fact that corporate franchises are conferred by the State, and are subject solely to the regulation of the State, when the corporation is not engaged in interstate commerce, does not withdraw this subject for taxation from the jurisdiction of the National Government, unless some clause of the Federal Constitution can be referred to which thus limits the power of Congress. No such limitation exists. On the contrary, the power granted to the Federal

Government to impose taxes and excises, is granted unreservedly, and without limitation, excepting only that direct taxes must be apportioned, and that excises must be levied in accordance with the rule of uniformity. It suffices, therefore, to show that corporate franchises are ordinary and proper subjects for excise taxation, whether in State schemes of taxation or elsewhere. If so, they come within the broad and general powers conferred upon Congress, to impose taxes and excises on all ordinary and proper subjects for such taxation, irrespective of the consideration that corporate franchises are, at the same time, subject to State taxes and excises, or that they are created, and may be regulated or destroyed by the State alone. It must now be considered as fully established that corporate franchises are properly subject to Federal excise taxes, notwithstanding the fact that the corporation may not be engaged in interstate commerce, and so is not subject in any way to Federal regulation or control.

Knowlton v. *Moore*, 178 U. S. 41.
Snyder v. *Bettman*, 190 U. S. 249, 252.
Scholey v. *Rew*, 23 Wall. 331.

2. The Constitutional objections urged against this Act are unsound, so far as they are based upon the kind or character of property, whether land, mines, tax-exempt securities, United States bonds or other forms of property held by the several corporations now before the Court. Such objections are based upon the assumption that the kind or character of property in which the capital of the corporation is invested present special reasons for attacking the Constitutionality of the law. Whereas, as shown above, if this is an excise tax upon the corporate franchises, or upon the right of doing business, it is utterly immaterial, as is the case with all excise taxes, what kind of property is held by the corporation, or, indeed, whether

it has any property at all. As was stated by Mr. Justice Shiras, in *New York State* v. *Roberts*, 171 U. S. 658, 664: "From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested".

3. The objection is made that this law is an infringement upon the sovereign rights of the States, and the power of the several States to tax corporations created by themselves, and subject solely to the regulation of the States because not engaged in interstate commerce. The proposition is thus stated by Mr. Justice White: "Wherever a right is subject to exclusive regulation by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having a mission to regulate". The proposition, as thus stated, was denied in *Knowlton* v. *Moore*, 178 U. S. 41, 59.

4. It is objected that this Corporation Tax is unreasonable and unnecessary, especially in times of peace, and that it is unfair to select the corporations of the country as the victims of this special kind of taxation, when firms and individuals engaged in the same lines of business are exempt from the tax. These and similar considerations are exclusively legislative questions, and the judgment of Congress with respect thereto is final and conclusive, as was stated by Mr. Justice Brewer, in *Patton* v. *Brady*, 184 U. S. 608, 623: "It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final". Nor upon similar grounds can the objection be sustained, that this legislation is unjust or unwise, or that some ulterior or wrongful purpose or motive has induced the legislation, as here it has been suggested that, aside from the

revenue to be collected, Congress had the ulterior purpose, by means of sworn returns, of arriving at information and publicity regarding the internal affairs of large corporations and trusts. But, as was stated by Mr. Justice White in *McCray* v. *United States*, 195 U. S. 27, 54: "No instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. . . .

(p. 56.) The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

5. The further objection has been raised that this legislation infringes the due process clause of the Fifth Amendment upon the ground that this Act of Congress was a mere arbitrary imposition of an excise on corporations, whereas, firms and individuals engaged in the same lines of business are not subject to such taxation. While this objection might be raised in a case where the taxing power, without any basis for classification, had arbitrarily taxed one article, and excluded another article of the same class, it clearly can have no application to a case where corporations, or associations similar to corporations, having a capital stock divided into shares, are put into one class, and all firms and individuals, not doing business in a corporate form, are put in another distinct class. The classification of corporations and non-corporations presents such obvious distinctions that it is unnecessary to argue that there is a reasonable basis for such classification. See *McCray* v. *United States*, 195 U. S. 27; *Board of Education* v. *Illinois*, 203 U. S. 553.

If it were sound that laws taxing corporation supon their franchises or privileges must also tax all individuals con-

ducting the same kind of business, then every excise tax levied on corporate franchises or privileges must have conflicted with the Fifth Amendment. But many such excise taxes have been sustained by this Court, as shown above.

6. No objection to the constitutionality of this Act, based upon the due process clause of the Fifth Amendment, can fairly be urged, unless this Act is a confiscatory statute or is a mere arbitrary exertion of the taxing power without any basis whatever for classification, arbitrarily taxing one article and failing to tax another article which fairly and legitimately comes within the same class. Clearly that is not the case here. Indeed, it has never been decided that even in such cases the due process clause would render such an act unconstitutional. It was assumed but not decided to be a legitimate contention in *McCray* v. *United States*, 195 U. S. 27, where it was argued there was such an arbitrary classification, and an abuse of the taxing power by imposing a tax on oleomargarine artificially colored so as to look like butter and by leaving untaxed artificially colored natural butter, Mr. Justice White there stating (p. 61): "Conceding merely for the sake of argument that the due process clause of the Fifth Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand"; and further stating (p. 64): "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was

not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated: that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights".

As the class here under consideration was composed of all the corporations in the country, except charitable corporations and the like, it is obvious that no such case is here presented as would bring into question the constitutional validity of a law which arbitrarily and without reason taxed certain members of a class, and exempted from taxation other persons in like situation, and coming under the same classification, for here all corporations of every kind, and associations having a *quasi* corporate form, having a capital stock divided into shares, are made subject to the tax, with the mere exception of charitable corporations and the like. In other words, all corporations and organizations having a *quasi* corporate form, and carrying on business for profit, form the class which is subjected to the tax, and all corporations throughout the United States, coming under this classification, are taxed at the same rate.

If it be further argued that it is an infringement of the due process clause, or that there is a denial of the equal protection of the laws, where all corporations are designated as a class, and subjected to an excise tax, while all individuals and firms, not pursuing business in a corporate form, though engaged in the same line of business, are put into a distinct class and exempted from the excise tax, upon the ground that such designation is discriminatory and an arbitrary abuse of the taxing power, it is sufficient to say that the decisions of this Court give no countenance to the theory that the selection by Congress of one class as a proper subject for excise taxation, rather

than another class, presents any reason for judicial interference, upon the ground that any provision of the Constitution has been contravened. As was said in *Spencer* v. *Merchant*, 125 U. S. 345, 355, by Mr. Justice Gray: "In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons: but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected".

The same idea was expressed by the Court, speaking through Mr. Justice White, in *McCray* v. *United States*, 195 U. S. 27, 61, in these terms: "The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artifically colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties".

See also *Treat* v. *White*, 181 U. S. 264, 269.
Patton v. *Brady*, 184 U. S. 608, 623.

7. One other suggestion should be referred to, which was persistently referred to in the arguments in the Income Tax cases, to the effect that in order to determine whether a tax is direct rather than indirect, it must first be ascertained whether the one upon whom the burden of paying it is first cast, can shift the burden to another person, it being

claimed as a theory of economics that if the burden cannot thus be shifted, the tax must necessarily be a direct tax, and consequently, that because income taxes, succession taxes and the like cannot be shifted, they must, therefore, be direct taxes, requiring apportionment. It is further argued that this was the decision of the Court in the Income Tax cases. This proposition was, however, fully met by Mr. Justice White in *Knowlton* v. *Moore*, 178 U. S. 41, 82.

8. An excise tax cannot be attacked upon the ground that it indirectly taxes or interferes with the instrumentalities of the State or Federal governments, for it is not a tax on property, and the kind of property indirectly is a matter of no consequence.

Van Allen v. *The Assessors*, 3 Wall. 573.
Snyder v. *Bettman*, 190 U. S. 249.
Home Insurance Co. v. *New York*, 134 U. S. 594.
South Carolina v. *United States*, 199 U. S. 437.
Knowlton v. *Moore*, 178 U. S. 41.

9. It is further contended in 2*a* of the Assignments of Error (Record, p. 10) that the special excise tax imposed on corporations under Section 38 of the Revenue Act of Congress, approved August 5, 1909, is unconstitutional, because it appears that the provisions contained in that Section "originated in the Senate of the United States and were concurred with by the House of Representatives subsequent thereto. Whereas, it is provided by the Constitution of the United States, Article 1, Section 7, that all measures for raising revenue shall originate in the House of Representatives".

Granted that the provisions of this section had their origin in the Senate, it was only by way of amendment to a revenue act having its origin in the House of Representatives. There can be no question that the Senate has

the power to amend a revenue bill, for that power is expressly conferred upon it by the Constitution.

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." Constitution of the United States, Article 1, Section 7, Clause 1.

This power to amend is not confined to the elimination of provisions contained in the original act, but embraces as well the addition of such provisions thereto as may render the original act satisfactory to the body which is called upon to support it. It has, in fact, been held that the substitution of an entirely new measure for the one originally proposed can be supported as a valid amendment.

Brake v. *Callison*, 122 Fed. 722.

In that case it was said by the court, p. 724, that "a proposition may be amended by an alteration which entirely defeats the purpose of the movers, or it may be turned into a motion of a different kind. The House is not obliged to consider a proposition which is moved and seconded, but it is within its power to substitute a different proposition, and this may be done by means of an amendment. This appears to have been the established law of parliamentary usage in England, and, though it appears to have been modified at an early date in our legislative law in some respects, I find that it has only been restricted to changes bringing in a subject different from the original."

But it is submitted that it is unnecessary to go into the question of whether this was a proper amendment, for it is well settled in this Court that the validity of a law which appears upon its face to have been properly enacted by Congress and duly approved by the President, cannot be assailed because of alleged informalities in its passage, and that the Journals of Congress are not admissible evidence for that purpose.

Marshall Field & Co. v. *Clark*, 143 U. S. 649.
Harwood v. *Wentworth*, 162 U. S. 547.

We accordingly submit that the corporation tax was not a direct tax upon property, but was an excise properly imposed upon the corporate franchises, or upon the right or privilege of doing business in a corporate form, or upon the business of the corporation; that in any aspect it was an excise tax, and that, being such, it was immaterial what kind of property the corporation held, or had invested its capital in, whether mines, land, income from land, United States bonds, State or Municipal bonds, tax-exempt securities, or other forms of property, or indeed, whether it had any property at all; that the excise imposed was uniform throughout the United States, within the meaning of the Constitution, and did not conflict with the due process clause or any other clause of the Federal Constitution, and was, therefore, constitutional and valid.

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JOSEPH H. KNIGHT,
Counsel for Appellees.

Supreme Court of the United States.

October Term, 1910.

No. 775.

JOSEPH E. GAY,
APPELLANT,

v.

THE BALTIC MINING COMPANY ET AL.,
APPELLEES.

Supplemental Brief for Appellees, upon Re-Argument.

I.

THE GOVERNMENT HAS MISCONCEIVED THIS CASE, ATTEMPTING TO SUPPORT THE TAX UPON THE WRONG GROUND, NAMELY, THAT THIS IS AN EXCISE UPON BUSINESS OR UPON THE ACTUAL TRANSACTION OF BUSINESS. — THE CORRECT GROUND UPON WHICH THIS ACT SHOULD BE SUSTAINED, SO FAR AS CORPORATIONS ARE CONCERNED, IS THAT IT IMPOSES AN EXCISE UPON A CORPORATE FRANCHISE, NAMELY, THE FRANCHISE OF DOING BUSINESS AS A CORPORATION, OR IN A CORPORATE FORM. — THE FACT THAT PRIVILEGE TAXES, AS AGAINST JOINT STOCK COMPANIES AND ASSOCIATIONS, AND CERTAIN INSURANCE COMPANIES, NOT POSSESSED OF CORPORATE FRANCHISES, ARE ADDED, DOES NOT AFFECT THE PROPER CONSTRUCTION OF THE TAX UPON CORPORATIONS, AS BEING AN EXCISE LEVIED UPON A CORPORATE FRANCHISE.

The Government has rested its case upon certain defined grounds, both in its original brief and at the

first argument. We submit that stronger and more conclusive grounds exist, in favor of the constitutionality of this tax.

The Government maintains that this is an excise on business, or on the actual conduct or transaction of business.

We submit that it is properly an excise imposed upon a corporate franchise, namely, the franchise of doing business as a corporation, or in a corporate form, so far as the tax upon corporations is concerned; that by the same Act excises are also imposed upon certain privileges so similar to corporate franchises that they may properly be termed *quasi*-corporate franchises; and that such excise taxes are open to no constitutional objection.

The Government theory, we submit, unnecessarily opens the door to new and doubtful questions which, upon our construction, are not in the case at all. It is true that casual, incidental expressions may be found in the Government's brief, indicating the belief that possibly the tax might also be supported as an excise on corporate franchises, but the main contention of the Government, repeatedly insisted upon, is that this is a tax on business, or on the transaction of business, and not upon any corporate franchise.

Government's Ground for supporting Constitutionality of this Tax.

The Government's claim is thus expressed (Original Brief for United States, pp. 8, 9):

This tax is an excise on "the actual conduct or transaction of business. . . . The property of the company is not the subject of the tax; *the franchises of the company are not the subject of the tax.*"

Correct Ground for sustaining the Tax, as claimed by these Appellees.

We submit, on the contrary, that this tax is an excise imposed upon the franchise of doing business as a corporation, or in a corporate form, and also upon certain franchises or privileges so similar thereto that they may properly be termed *quasi*-corporate franchises; that a tax laid upon corporate franchises or privileges is an excise, and not a property tax; that such taxes have repeatedly been upheld as excises; that this tax, considered as an excise upon corporate franchises or privileges, cannot be held to be unconstitutional without overruling various decisions of this Court; that, if an excise, the character of the property owned by the different corporation defendants, whether land, rents, mines, easements or franchises in the public streets, United States bonds, tax-exempt securities, or other forms in which their capital may be invested, is an immaterial factor, for an excise is not in any sense a property tax; that if this

tax is an excise laid upon a corporate franchise or privilege, all arguments based upon the Fifth Amendment are wholly apart from the issues properly involved in the case, for if the tax is imposed upon the franchise or privilege of doing business as a corporation, or in a *quasi*-corporate form, it is wholly within the discretion of Congress to select franchises as the proper subject for an excise, and to leave untaxed all other subjects, and therefore that it is wholly immaterial here that Congress, having selected corporate franchises and *quasi*-corporate franchises or privileges as the subject of the tax, has, in its discretion, left untaxed all firms and individuals, even though conducting the same kinds of business as the corporations taxed; and that, consequently, this tax, considered as an excise upon corporate franchises, or *quasi*-corporate franchises or privileges, is plainly constitutional within well-settled principles.

We do not, however, mean to imply that the tax might not also be sustained upon the main ground urged by the Government, that this is a tax upon business, or upon the actual conduct or transaction of business, rather than upon the franchise of doing business as a corporation, or upon the franchise or privilege of transacting business in a *quasi*-corporate form.

It should, however, be pointed out that the case becomes vastly simplified, if rested squarely and directly upon the unquestioned constitutional power of the Federal Government to levy an excise upon a

corporate franchise or privilege. For then the Fifth Amendment, and the able and ingenious arguments here presented with reference thereto, are out of the case. No one will suggest that a tax upon a corporate franchise, otherwise good, becomes constitutionally objectionable because of the mere fact that firms and individuals not possessing corporate franchises are not also taxed. An excise upon a corporate franchise is constitutionally valid, not because there has been proper classification under the Fifth Amendment, but because of the general power of Congress to select the subjects for excise taxation. In such case no classification is necessary, and arguments as to discrimination and arbitrary classification become immaterial. The simple inquiry is whether a corporate franchise properly comes within the scope of the taxing powers of Congress. The fact that something else has escaped taxation, or that firms and individuals not subject to excise taxation, or that other appropriate subjects for excise duties, like vocations, employments, special privileges, particular business transactions and the like, have not, at the same time and by the same law, been subjected to taxation, presents wholly immaterial considerations.

Moreover, the selection of the proper ground upon which to support this tax involves important differences with respect to the persuasive or conclusive character of previous adjudications of this Court. Thus, taxes upon various corporate franchises or privileges have repeatedly been sustained as excises. We maintain that the Civil War tax decisions as to

excises upon various corporate franchises, practically require a decision in favor of the validity of an excise imposed upon all the corporations of the country, unless those decisions are to be regarded as overruled; but if not, it is only a step, by way of analogy, from those cases to a decision upholding this tax as an excise tax upon corporate franchises or privileges, properly assessed upon every corporation organized for profit and having a capital stock represented by shares. On the other hand, when this tax is attempted to be supported as an excise upon business, or upon the "actual conduct or transaction of business," we are confronted with the situation that, while this Court has repeatedly held that special kinds of business, or various kinds of particular business transactions, may be singled out as the subjects of excise taxation, it has never thus far determined that an excise may properly be imposed upon *all kinds* of business conducted in the country. In such a case, the question fairly arises, as exemplified in the Stone Tracy case now before the Court, why should a certain kind of business be taxed, when carried on by a corporation, and the same business, when conducted by a firm or individual, remain untaxed? Immediately, questions here arise as to arbitrary taxation, and as to classification, which could not fairly be raised if the tax is supported as an excise upon a corporate franchise. In reply to attacks based upon the Fifth Amendment, the only classification attempted by the Government comes back to the distinction between business, as transacted in a corporate

form, and as conducted by firms or individuals. We submit that it is simpler, as well as a more reasonable construction of this law, to hold that this is an excise imposed upon the *franchise* of conducting business as a corporation, or in a corporate or *quasi*-corporate form, and that, as such, it is open to no constitutional objection.

It is not easy to understand why the Government prefers to rest its case mainly upon the ground that this is a tax upon *business*, or the *transaction* of business, rather than upon corporate franchises, an attitude which opens the law to all sorts of constitutional attacks, as exemplified by the elaborate briefs filed in behalf of the various appellants. Possibly the Government fears that it may be held that a tax upon a corporate franchise, which is, in a sense, a property right, is a property tax, and therefore a direct tax, and so is unconstitutional because not apportioned according to population among the several States. But if it should so be held, all the cases in this Court, supporting various taxes upon corporate franchises, as excises, and holding them not to be property taxes, were erroneously decided. No case has ever been decided by this Court in which such taxes upon corporate franchises were sustained upon any other ground than that they did not constitute property taxes, but were excises.

Beginning with early times this Court has uniformly held that taxes upon corporate franchises were excises, and not property taxes, and that, as property taxes, they could not be supported.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632.
Society for Savings v. *Coite*, 6 Wall. 594.
Provident Institution v. *Massachusetts*, 6 Wall. 611.
Pacific Ins. Co. v. *Soule*, 7 Wall. 433.
Railroad Co. v. *Collector*, 100 U.S. 595.
Veazie Bank v. *Fenno*, 8 Wall. 533.
Home Ins. Co. v. *New York*, 134 U.S. 594.
New York v. *Roberts*, 171 U.S. 658.

As stated by Mr. Justice CLIFFORD, —

"Corporate franchises . . . are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter, and the rule is equally well settled that the privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State. . . . All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State Government. Power to that effect resides in the State independent of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investments in Federal securities."

Hamilton Co. v. *Massachusetts*, 6 Wall. 632, 638, 639.

Society for Savings v. *Coite*, 6 Wall. 594, 606, 607.
Veazie Bank v. *Soule*, 8 Wall. 533, 547.

It is equally well settled that, owing to our dual form of government, the Federal Government may also impose excises upon privileges or franchises, even though granted by and subject to the exclusive regulation of the State.

Knowlton v. *Moore*, 178 U.S. 41, 58, 59.

II.

PROPER SUBJECT OF THE EXCISE DUTY IMPOSED BY THE FEDERAL CORPORATION TAX LAW, SO FAR AS CONCERNS CORPORATIONS, IS THE CORPORATE FRANCHISE OF DOING BUSINESS AS A CORPORATION. — THE GOVERNMENT CLAIM THAT THIS IS AN EXCISE UPON BUSINESS, OR THE TRANSACTION OR CONDUCT OF BUSINESS, IS NOT SOUND.

What is the *subject* of the excise duty created by the Federal Corporation Tax law? The Government's main contention (Original Brief for United States, p. 8) is that it is the "actual conduct or transaction of business." The Government urges that "the *subject* of the tax is thus expressly declared to be 'the carrying on or doing business by' the companies taxed; . . . *the franchises of the company are not the subject of the tax.*" (*Ibid.* p. 9.)

The words of the Act specially relied upon in the Government brief (p. 9) may be significant, but of

still more importance is the fact that the Act in terms provides as to the *subject* of the tax. It provides "that every *corporation*, *joint stock company or association*, organized for profit and *having a capital stock represented by shares*, and every insurance company . . . shall be *subject* to pay annually" the specified tax; and that this excise tax shall be paid "with respect to the carrying on or doing business *by such corporation*, joint stock company or association, or insurance company."

The *corporation* is the *subject* of the tax, according to the literal terms of the Act. Nor is the language confined to the "carrying on or doing *business*," but the special excise tax is imposed "with respect to the carrying on or doing business *by such corporation*, joint stock company or association, or insurance company." In other words, upon the face of the Act, the real *subject* of the tax is the corporate form of organization, or the franchise of doing business *as a corporation*, or a form of organization so closely allied to the corporate form as to be tantamount to it.

It is, indeed, questionable whether the special clause relied on by the Government tends to clarify the meaning of the Act. If this clause had been omitted and the special organizations, like insurance companies, and joint-stock companies and associations eliminated, and the Act had been specifically confined to corporations, it would then have read: "That every corporation organized for profit and having a capital stock represented by shares shall be

subject to pay annually a special excise tax equivalent to one per centum upon the entire net income over and above $5,000." If the Act had been in this form, it could not be questioned that it would have constituted an excise duty imposed on corporate franchises and measured by the amount of the net income. In that form it would clearly have come under various previous decisions supporting such taxes upon corporate franchises as excises, and not as property taxes. Is the intent of the Act changed by the addition of the special clause relied on by the Government, and by the inclusion of certain *quasi* corporations, as well as insurance companies? It would seem not. It is probable that this clause was added with special reference to insurance companies and joint-stock companies not possessed of corporate franchises, for the purpose of excluding a possible inference that, as applied to them, the tax might be considered as imposed upon their net receipts, considered as property. The language of this clause was evidently copied from the language of Mr. Justice HARLAN, in the opinion rendered in the Sugar case (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S. 397, 411) where it was stated,—

> "Clearly the tax is not imposed upon gross annual receipts as property, but only *in respect of the carrying on or doing the business of refining sugar.*"

[The language of our Act is "doing business *by such corporation*," etc.; there it was "doing the business of refining sugar."]

In the Sugar case the law was sustained as being an excise upon a particular business, or upon the transaction of a particular business, and could not have been sustained otherwise, for the Act covered individuals and firms as well as corporations, and the subjects of the tax were expressed to be "every person, firm, corporation, or company carrying on or doing the business of refining petroleum or refining sugar," etc.

In the present case, individuals and partnerships are not affected by this tax, which is expressly confined to corporations, organizations similar thereto and possessing a *quasi*-corporate form, and to insurance companies. We submit that the *subject* of this tax is the corporate form of organization or the franchise of doing business as a corporation, or in a corporate or *quasi*-corporate form, and that, considered as an excise upon a corporate franchise, the tax is within the constitutional powers of the Federal Government, as settled by various decisions of this Court. The distinction may seem slight between an excise imposed upon the *franchise* of doing business as a corporation, and a tax upon *business* when conducted by a corporation. We submit that, from either point of view, the excise would be constitutionally valid. But the distinction creates important differences with respect to the questions now open for argument. Important and difficult questions under the Fifth Amendment may fairly be raised and argued, if the tax be regarded as an excise upon *business*, whereas no such questions are open, if con-

sidered as an excise upon a corporate or *quasi*-corporate franchise or privilege. Moreover, if this is an excise upon a corporate franchise or upon the franchise of doing business as a corporation, all questions as to the character of property possessed by these corporation defendants become wholly immaterial, and are concluded by the previous decisions of this Court, for, as stated by Mr. Justice SHIRAS,—

> "From the very nature of the tax, being laid as a tax upon the *franchise of doing business as a corporation*, it cannot be affected in any way by the character of the property in which its capital stock is invested."
>
> *New York State* v. *Roberts*, 171 U.S. 658, 664.
> *Plummer* v. *Coler*, 178 U.S. 115, 135, 137.

As stated by Mr. Justice FIELD, upholding a State tax upon the "corporate franchise or business" of "every corporation, joint stock company or association,"—

> "By the term 'corporate franchise or business,' as here used, we understand is meant . . . the right or privilege granted by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity."
>
> *Home Ins. Co.* v. *New York*, 134 U.S. 594, 599.
> See *Southwestern Oil Co.* v. *Texas*, 217 U.S. 114, 123.

III.

THE CORPORATION TAX, REGARDED AS AN EXCISE UPON THE FRANCHISE OF DOING BUSINESS AS A CORPORATION, OR IN CORPORATE FORM, IS CONSTITUTIONAL AND VALID, WITHIN VARIOUS PREVIOUS DECISIONS OF THIS COURT. — IF SUCH AN EXCISE SHOULD BE HELD UNCONSTITUTIONAL, THESE DECISIONS MUST BE OVERRULED.

If this tax be regarded as an excise upon a corporate franchise or privilege, or upon a *quasi*-corporate franchise or privilege, as we contend, the constitutional validity of such an excise is settled by the previous adjudications of this Court. If it should be held that such an excise is not constitutional, some or all of the following decisions were erroneously decided, and must now be overruled, —

Pacific Ins. Co. v. *Soule*, 7 Wall. 433, holding to be an excise, and not a direct tax, the Civil War tax upon insurance companies based and levied upon the "amounts insured, renewed, or continued by insurance companies; upon the gross amount of premiums received and assessments by them" and also upon "dividends, undistributed sums, and income."

Society for Savings v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611, holding taxes upon savings banks, based on the aggregate amount of their deposits, to be excises and not property taxes.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632, holding a tax on a manufacturing corporation, based upon the excess of the market value of its capital stock

over and above the value of its real estate and machinery, to be an excise and not a property tax.

Railroad Co. v. *Collector*, 100 U.S. 595, holding the Civil War tax to be an excise and not a property tax, which provided that railroad, canal, and turnpike, and certain similar classes of corporations, which should issue bonds upon which interest was to be paid, or should declare dividends payable to their stockholders as part of the "earnings, profits, income or gains of such company," and "all profits of such company carried to the account of any fund, or used for the construction," should be subject to and pay a tax of 5 per cent on the "amount of all such interest or coupons, dividends or profits."

The above case was followed in —

United States v. *Erie R.R. Co.*, 106 U.S. 327, —

and expressly approved in, —

Railroad Co. v. *United States*, 101 U.S. 543, 550.

Bailey v. *Railroad Co.*, 106 U.S. 109, 115.

Memphis & Charleston R.R. Co. v. *United States*, 108 U.S. 277, 279.

Veazie Bank v. *Fenno*, 8 Wall. 533, holding to be an excise and not a property tax, a 10 per cent tax on "the amount of notes of any State bank, or State banking association, paid out" after a specified date

by any "National banking association, State bank or State banking association," Chief Justice CHASE stating (p. 547), —

> "But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property."

New York State v. *Roberts*, 171 U.S. 658, holding to be an excise and not a property tax, a statute of New York, providing that "every *corporation, joint stock company or association* [the exact words of our law] whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State [with certain exceptions] . . . shall be liable to and shall pay a tax as a tax upon its franchise or business," and based upon the "amount of capital stock employed within this State."

Home Ins. Co. v. *New York*, 134 U.S. 594, upholding the same New York statute as an excise upon "its corporate franchise" defined by the Court (p. 599) as meaning "the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity."

This case is conclusive as to State excise taxes

imposed upon corporate franchises. No distinction can be drawn as to Federal excises imposed upon franchises granted by the State, for it has been expressly held that privileges granted by the State and subject to the exclusive regulation of the State, like the right of inheritance, may still be taxed, as excises, by the Federal Government, the power of taxing franchises and privileges, as excises, not being confined to the "government having the mission to regulate."

Knowlton v. *Moore*, 178 U.S. 41, 59.
See also *Pembina Mining Co.* v. *Pennsylvania*, 125 U.S. 181.
Horn Silver Mining Co. v. *New York*, 143 U.S. 305.

Above all, the long line of decisions upholding State and Federal inheritance taxes as excises, must also, in that event, be regarded as overruled, for they were decided upon the analogy of what was supposed to be a settled line of decisions upholding taxes upon the franchises of corporations as excises, this Court stating, in *Plummer* v. *Coler*, 178 U.S. 115, 137,—

> "We are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon *franchises of corporations*, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents."

> (Page 135:) "We return to the authorities, by which it has been established that a tax upon a *corporate franchise*, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the State."

If taxes upon corporate franchises cannot be upheld as excises, it follows that the inheritance tax cases, which were expressly based upon the analogy of excises upon corporate franchises, must also be overruled, including *Plummer* v. *Coler*, *supra*.

See other inheritance tax cases, —

Knowlton v. *Moore*, 178 U.S. 41.
Scholey v. *Rew*, 23 Wall. 331.
Murdock v. *Ward*, 178 U.S. 139.
Orr v. *Gilman*, 183 U.S. 278.
Snyder v. *Bettman*, 190 U.S. 249.
Cahen v. *Brewster*, 203 U.S. 543.
Chanler v. *Kelsey*, 205 U.S. 466.
Buck v. *Beach*, 206 U.S. 392, 408.

And numerous other inheritance tax cases, following the above decisions, must also be overruled.

If, on the other hand, this tax should be considered as an excise upon *business*, it is submitted that the Court should follow *Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S. 397, 413.

If this is an excise duty of any kind, it cannot be attacked upon the ground that it taxes or interferes

with the instrumentalities of the State or Federal Governments, including Government bonds, State or municipal bonds, and other tax-exempt securities, for if it is an excise tax at all, whether imposed upon franchises or upon business, it is not a tax on property, and therefore the character of the property in which the capital of the corporation may be invested is an immaterial factor.

South Carolina v. *United States*, 199 U.S. 437.
Knowlton v. *Moore*, 178 U.S. 41.
Van Allen v. *Assessors*, 3 Wall. 573.
Home Ins. Co. v. *New York*, 134 U.S. 594.
Snyder v. *Bettman*, 190 U.S. 249.

If this tax, as an excise, was within the delegated powers of Congress, it was wholly within the discretion of Congress to select the objects upon which the excise should be laid, and no constitutional objection can be urged to the statute arising from the fact that corporate franchises were selected rather than something else as the subject of the excise tax.

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, 562.
Home Ins. Co. v. *New York*, 134 U.S. 594, 606, 607.
Southwestern Oil Co. v. *Texas*, 217 U.S. 114, 123.

McCray v. *United States*, 195 U.S. 27, 61.

Spencer v. *Merchant*, 125 U.S. 345, 355.

See also *Treat* v. *White*, 181 U.S. 264, 269.

Patton v. *Brady*, 184 U.S. 608, 623.

As urged by us, if the tax is an excise upon a corporate franchise, no question as to the Fifth Amendment fairly arises. If, however, classification under that Amendment is here important, the distinctions between the corporate form of doing business and the transaction of business by an individual or as a firm are sufficiently clear to warrant the adoption of that distinction as the basis for classification.

McCray v. *United States*, 195 U.S. 27.

Board of Education v. *Illinois*, 203 U.S. 553.

If objection be made to the Act upon the ground that it exempts certain charitable and other organizations, it is to be observed that the exempting clause was in most instances, at least, entirely superfluous, as the Act was only intended to apply to organizations established for profit and having a capital stock represented by shares. Most, if not all of the exempted classes of organizations are not organized for profit, nor have they any capital stock represented by shares.

IV.

ONE PART OF A STATUTE, THOUGH UNCONSTITUTIONAL, IF SEPARABLE FROM REMAINING PROVISIONS OF THE STATUTE, DOES NOT AFFECT THEIR CONSTITUTIONALITY. — SO, HERE, THE MAIN PURPOSE OF THE ACT BEING TO IMPOSE AN EXCISE UPON CORPORATE FRANCHISES, THE CONSTITUTIONAL VALIDITY OF SUCH EXCISES IS NOT IN ANY MANNER AFFECTED BY THE ADDITION OF EXCISES UPON INSURANCE COMPANIES AND JOINT-STOCK COMPANIES AND ASSOCIATIONS, EVEN THOUGH THEY BE REGARDED AS PURELY PRIVILEGE TAXES IMPOSED UPON SPECIAL KINDS OF BUSINESS. — THE ADDITION OF CERTAIN PRIVILEGE TAXES TO EXCISES ON CORPORATE FRANCHISES DOES NOT AFFECT THE CONSTITUTIONAL VALIDITY OF THE LATTER.

> "Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this Court to so declare, and to maintain the act in so far as it is valid."

El Paso & N.E. Ry. v. *Gutierrez*, 215 U.S. 87, 96.

Southwestern Oil Co. v. *Texas*, 217 U.S. 114, 121.

Berea College v. *Kentucky*, 211 U.S. 45, 54, 55.

Field v. *Clark*, 143 U.S. 649, 695.

Huntington v. *Worthen*, 120 U.S. 97, 102.

Allen v. *Louisiana*, 103 U.S. 80, 83.

This proposition is well settled and will be followed by the Court except where the main purpose of the Act is declared to be unconstitutional, and where, accordingly, it may fairly be inferred that Congress would not have enacted the minor parts of the statute if it had understood that the main purpose of the Act could not constitutionally be carried out. This was the case with the minor provisions of the Income Tax.

See *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 637.
Southwestern Oil Co. v. *Texas*, 217, U.S. 114, 121.
Poindexter v. *Greenhough*, 114 U.S. 270, 304.
Sprague v. *Thompson*, 118 U.S. 90, 95.
Warren v. *Charlestown*, 2 Gray, 84.
International Text Book Co. v. *Pigg*, 217 U.S. 91, 113.

Here the main purpose of the Act was to tax certain corporate franchises of the 400,000 or more corporations in the country. The fact that it was deemed advisable to add excises upon joint-stock companies and associations, and insurance companies, cannot in any manner affect the constitutional validity of the excise imposed upon corporations. If the additional excises imposed are for any reason unconstitutional, the excises levied upon corporations, being separable, may stand upon their own ground and be regarded as constitutionally valid, irrespective of the

unconstitutionality of other parts of the same statute. But even if joint-stock companies and associations, and certain classes of insurance companies, possess no corporate franchises, the tax may still be sustained as against them, upon the ground that in their case it was a privilege or a particular kind of business that was aimed at by the excise duty imposed. Although certain privilege taxes or excises upon particular kinds of business are thus added to the excise imposed upon the franchise of doing business as a corporation or in a corporate form, this addition cannot affect the nature or the validity of the excise imposed upon certain corporate franchises. If, for example, the Act had said "all corporations with respect to their franchises, and also all lawyers with respect to their vocations, shall be taxed," at a certain rate, the combination in the same statute of a privilege tax imposed upon a business or occupation with an excise levied upon corporate franchises obviously would not affect the construction, character, or constitutional validity of the latter.

We, accordingly, submit that this tax was not a direct tax upon property, but was an excise properly imposed on corporations upon their *franchises* of doing business as corporations and in a corporate form, and imposed on the other organizations named with respect to their privileges or franchises of doing business in a *quasi*-corporate form. If not imposed upon corporate or *quasi*-corporate franchises or privileges, this excise was properly imposed upon *business*,

when transacted or conducted in a corporate or *quasi*-corporate form. In any aspect, this was an excise tax, and, being such, it was immaterial what kind or class of property was held by the corporation, whether tax-exempt securities or otherwise, or, indeed, whether it had any property at all. The excise imposed by this Act was geographically uniform throughout the United States, within the meaning of the Federal Constitution, and did not conflict with the Fifth Amendment to the Constitution by reason of being arbitrary, discriminatory, or lacking proper classification. Nor did it conflict with any other clause of the Federal Constitution. The excise imposed by this law was therefore constitutional and valid.

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